IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1497

State of Arkansas ..... *Petitioner*

Vs.

Lonnie Jasmon Bolden ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF FOR PETITIONER

STEVE CLARK
Attorney General

JOSEPH H. PURVIS
Deputy Attorney General
Justice Building
Little Rock, Arkansas 72201

and

JOHN WESLEY HALL, JR.
Deputy Prosecuting Attorney
304 Pulaski County Courthouse
P. O. Box 1979
Little Rock, Arkansas 72203
Attorneys for Petitioner

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CASES

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Vs.

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ARGUMENT

The respondent's brief is filled with the broken field logic which might be expected from one occupying his fact position. The respondent, faced with the task of placing a round peg in a square hole, has attempted to do just that, via his attempt to remove this case from the ambit of the automobile exception to the Fourth Amendment and place it within the confines of *Chadwick* v. *United States,* 433 U.S. 1 (1977). When confronted with the holdings of *Carroll* v. *United States,* 267 U.S. 132 (1925); *Chambers* v. *Maroney,* 399 U.S. 42 (1970), and others, he leaps to another topic or attempts to dismiss them by misstatements of their rationale and holdings.

The initial error bearing discussion is the respondent's erroneous dismissal of *Chambers* v. *Maroney, supra.* In so doing, the respondent notes that:

a justification for the delayed search in *Chambers*, supra, in that the occupants in the car were arrested in a dark parking lot in the middle of the night and a careful search at that point was impractical perhaps unsafe for the officers. *Chambers*, supra, at 52., n.6. Nothing in *Chambers*, supra, suggests that the officers could search a suitcase clearly utilized as a repository of personal effects without first procuring a warrant." Respondent's brief, PP. 5-6.

The last sentence quoted above will be dealt with fully in subsequent paragraphs. The petitioner calls the Court's attention to the fact that this quote is an example of the respondent's broken field logic used to ignore the Court's holdings which are contrary to his position.

The respondent here has merely explained some of the practicalities for allowing the officers to search the car at the police station, rather than at the scene and has failed to note the full impact and the rationale: that the officers in *Chambers* had probable cause to search, coupled with the exigent circumstances inherent in the fact that there was an automobile involved containing the probable felons and the fruit of the crime. The facts being as they were, the Court found no constitutional difference between seizing the car and occupants and holding them until a magistrate could rule on probable cause and issue a warrant, and carrying out an immediate warrantless search. *Chambers* v. *Maroney*, supra, 399 U.S. at 50-52.

The fact is simply that, contrary to the respondent's treatment of it, *Chambers* is applicable to the facts of the case at bar. Here, as in *Chambers*, the officers had probable cause to believe that the taxi contained the probable felons and a suitcase full of contraband. There were likewise present exigent circumstances

in that they were contained in a taxi speeding away from the airport to an unknown destination during 5:00 P.M. rush hour traffic on a Friday afternoon when stopped.

The respondent next attempts to buttress his position by reliance upon the Eighth Circuit's holding in *United States* v. *Schleis*, 582 F. 2d 116 (8th Cir. 1978). The petitioner will not here attempt to reiterate the distinction between the present case and *Chadwick* which it drew in its original brief. Suffice it to say that *Chadwick* stands on its own footing and has its own realm, into which the present case does not fall. The petitioner makes this statement by way of showing that *Schleis* falls squarely within the facts of *Chadwick* (See 582 F. 2d at 1168-1169). Indeed, the petitioner points out that this Court obviously agrees, having remanded *Schleis* for further consideration in light of *Chadwick*. 403 U.S. 905; also, 582 F. 2d at 1167.

The petitioner thoroughly distinguished the doctrine of "search incident to an arrest" from that of the automobile exception in its original brief. Save it to say the petitioner fails to see the correlation between the search of a defendant's locked briefcase at the station, after he had been placed in a cell, as in *Schleis*, not remotely dealing with the automobile exception, and the search in the case at hand.

The respondent also relies upon *United States* v. *Stevie*, 582 F. 2d 1175 (8th Cir. (1978). The fact situation in *Stevie* was almost identical to the one here in that the defendants had been apprehended by DEA officers after they had left the St. Paul airport. It should be noted here that the opinion relied upon by the respondent was rendered on rehearing. The *Stevie* panel had originally upheld the constitutionality of the search and seizure in an opinion by Judge Webster which distinguished *Chadwick*.

United States v. *Stevie,* 578 F. 2d 204 (8th Cir. 1977).

The opinion on rehearing upon which the respondent relies is erroneous and it is obvious that the court fell into the same misconstrued interpretation of *Chadwick* as did the Arkansas Supreme Court in its opinion below here. Indeed, this can be easily seen by the fact that, in making its decision, the court relied in part on the *Sanders* decision. 582 F. 2d 1179, n. 5.

The petitioner feels that the distinction between *Chadwick* and the facts of *Stevie* and the case at hand were correctly noted by Chief Judge Gibson in his dissent:

> "After carefully considering Judge Heaney's opinion and reconsidering the panel opinion in this case, published at 578 F. 2d 204, I would affirm the convictions. As determined by the panel opinion, the search of the suitcase should be upheld as within the automobile exception to the warrant requirement. *United States* v. *Finnegan,* 568 F. 2d 637, 641-42 (9th Cir. 1977).
>
> I have little to add to the panel opinion but will correct the apparent misapprehension of the majority as to the distinction the panel drew between *Chadwick* and the present case. The majority view *Chadwick* as involving seizure of a footlocker *outside* an automobile. Actually, in both cases the luggage was inside an automobile when seized. However, in *Chadwick,* the Government conceded that no automobile search was involved because the seizure occurred immediately after the footlocker was placed in the automobile's trunk and before the trunk had been closed or the engine started. This fleeting contact was not sufficient to bring the automobile search exception into play.

> By contrast, the seizure in this case occurred on a four-lane express highway. The suitcases had been transported a considerable distance in the automobile by the defendants. The search was conducted immediately after the automobile was stopped. Thus the present case is distinguishable from *Chadwick* by the significant contact the suitcases had with the automobile.*United States* v. *Chadwick,* 433 U.S. at 22-24, 97 S. Ct. 2476 (Blackmun, J., dissenting). The reasons justifying warrantless automobile searches apply, in my opinion, to searches of containers found inside the automobile. See cases cited in *United States* v. *Chadwick,* 433 U.S. at 23 n.4, 97 S. Ct. 2476 (Blackmun, J., dissenting).
>
> There is one other element of the majority's decision that disturbs me. The majority opinion in this case and in *United States* v. *Schlies,* 582 F. 2d 1166 (8th Cir. to be filed concurrently), seem carefully crafted to suggest that warrants will now be required for a search of most personal property that had been reduced to the exclusive control of law enforcement officers. The dictum in the panel opinion in *United States* v. *Haley,* 581 F. 2d 723 (8th Cir. 1978) carries this suggestion one step further. It correctly upholds the warrantless opening of a zippered leather container found in plain view in a car, but only because of the exigent circumstances of an apparently injured man needing assistance. To assume that the expectation of privacy in a zippered bag approaches the expectation of privacy in a locked footlocker is carrying the analogy beyond its reasonable limits. The entire opinion in *Chadwick* is premised on the obvious expectation of privacy enjoyed by a person who doublelocks a footlocker.

As properly noted in *Chadwick*, the warrant clause of the Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy", but how much "legitimate" expectation of privacy should a person be permitted to enjoy in the concealment and transportation of contraband? If *Chadwick* is viewed as applying to all closed pieces of luggage and containers that are subject to personal modes of transportation, then the enforcement of the criminal laws will be severely diminished by the inability of the law enforcement officers to discover and apprehend those who are in the pursuit of lawless activities. The additional time, energy and cost in attempting to locate a magistrate and secure a warrant cannot help but impair and diminish the effective operation of law enforcement officers. This is not to say that the Fourth Amendment is not a prized personal constitutional right enjoyed by free people, but the Fourth Amendment proscription is "against unreasonable searches and seizures." In this situation I do not think that the defendant had, should have had, or could have had any "legitimate" expectation of privacy in the concealment of marijuana in a closed piece of luggage being transported on a public highway of this country. I view this search as reasonable. . . . ."

582 F. 2d at 1180-1181.

The respondent next states that the Fourth Amendment protects people not places and asks that the Court focus its attention on the privacy interest of the passenger and not on the moving taxi or the suitcase. He goes on further to state that the Court's language dealing with the lesser expectation of privacy in an auto, found in *Cardwell* v. *Lewis*, 417 U.S. 583, 589-590 (1974), holding that there is a lesser expectation of privacy in an

automobile because the automobile seldom serves as the repository of personal effects, is "unnecessarily broad and not entirely accurate." Respondent's brief, p. 10.

The petitioner agrees that the Fourth Amendment protects people, not places. The petitioner hastens to add, however, that in *Cardwell*, supra; *Cady* v. *Dumbroski*, 413 U.S. 433 (1973); *Chambers*, supra; and *Carroll*, supra, the Court has noted that there is a lesser expectation of privacy which attaches to automobile passengers.

This is most implicit in the holdings above, for it is not the lifeless *automobile* itself which has the lesser expectation of privacy; but rather, those who use and operate automobiles upon the public thoroughfares. Indeed, this is one of the foundations of the automobile exception noted in *Cardwell*, supra; *Chambers*, supra; and *Carroll*, supra.

The respondent is somewhere in between talking out of both sides of his mouth, and wanting to have his cake and eat it too. He first argues that the Fourth Amendment protects people not places. Then, while begrudgingly admitting the diminished expectation of privacy of automobile passengers, he nevertheless asks the Court to disregard this concept because of a thing or place, i.e., luggage, inside the automobile. In other words, the respondent appears to be contending that the same degree of privacy which would attach to a suitcase which is found in one's home, attaches to that suitcase when it is found in a car. However, the Fourth Amendment right of privacy is not lodged in lifeless objects, to-wit: the automobile itself, or luggage found therein; rather, this right inures to the *persons* who operate vehicles and who place luggage therein. As noted above, it is not the automobile which has the lesser expectation of privacy, but

rather, those who operate them. Thus, the respondent's logic convolutes his own "people vs. places" argument.

It thus stands to reason that a person carrying contraband in a container within a common carrier on the public highway has a somewhat more diminished expectation of privacy than would one having such container within the confines of his own home.

In this regard, remembering that the Fourth Amendment protects people not places, the petitioner cannot help but wonder whether the person carrying contraband in an unlocked container within a common carrier on a public street has a greater expectation of privacy than *Carroll* did in carrying contraband hidden *inside the seats* of his private automobile? Likewise, does he have a greater expectation of privacy than did *Chambers* carrying contraband in a concealed compartment under the dashboard of his private automobile?

Going further and in regard to the last sentence of the top paragraph of respondent's brief on p. 6, the petitioner knows of no cases, save the one at bar and the rehearing opinion in *Stevie*, supra, which have prohibited those conducting a legitimate automobile-exception search from searching containers found in the car. Indeed, as noted by both the Ninth Circuit in *United States* v. *Finnegan*, 568 F. 2d 637, 641 (9th Cir. 1971), and the Dissent of Chief Judge Gibson in *Stevie*, supra, 582 F. 2d at 11801181, to so rule would be illogical and would lead to inconsistent and contradictory results.

Another related point which bears discussion is, assuming that the respondent's contention regarding a " luggage exception"to the automobile exception is adopted, what then con-

stitutes "luggage"? Would luggage be limited to "American Tourister"? Would it be extended to cover briefcases? Would it extend to sacks or paper bags in which a person *might* keep "personal effects"? If not, could the poor then raise an Equal Protection claim if they did not have the money to afford "formal luggage"? How would an officer, in the process of conducting an otherwise reasonable search under the automobile exception, know what constituted "luggage" and what did not?

To follow where the respondent seeks to lead the Court surely would lead to either the "inconsistent and contradictory results" which *Finnegan* supra, spoke of; or, it would totally emasculate the reasonable and necessary automobile exception to the warrant requirement of the Fourth Amendment. Neither of these results should follow, nor should the respondent's logic be followed.

The respondent next attempts an implicit dismissal of the automobile exception by the ludicrous contention that once he was stopped by the officers the exigent circumstances ceased to exist and that the officers should have taken the whole kit and kaboodle to the police station. In so doing, the respondent again attempts to draw the "search-incident" doctrine under *Chimel* v. *California*, 395 U.S. 752 (1971).

First, it should be restated, as on page 21 of the petitioner's original brief, that the exigent circumstances do not melt away like snowflakes in the Bahamas simply because the officers have stopped the defendant. This is obvious from the facts surrounding the constitutional search in *Carroll*, supra. It is even more apparent in light of the fact that the *Chambers* search was not done at the scene, but rather, at the police station. *Chambers* v. *Maroney*, 399 U.S. at 44. If the respondent's logic were followed,

the only way such a search would ever be accomplished would be when a daring officer made a "John Wayne" leap from his moving vehicle into the moving automobile of the defendant and conducted the search while fighting with a felon.

At this point, the petitioner would reiterate its contention in its original brief that exigent circumstances did indeed exist in the instant case. Without rehashing the factual circumstances of the case, which are set forth in detail in the original brief, the petitioner notes that while the ultimate decision of whether exigent circumstances were present as a matter of law in any given case is one to be determined after the fact by the trial court, the initial determination thereof must necessarily be made by the law enforcement officer present at the time of the incident. The making of this determination is similar to the determination of probable cause, which, as noted in *Draper* v. *United States,* 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959) and *Brinegar* v. *United States,* 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 2d 1879 (1949), must be based upon the factual and practical considera tion of a prudent police officer at the time of the arrest — not from the vantage point of a legal technician. A moving automobile on a busy public thoroughfare was involved herein; it has long been recognized that exigent circumstances are inherent in moving vehicles once they are stopped. As noted in *Carroll,* this doctrine has been in existence since at least 1789. 267U.S. at 150, 151.

Moreover, it is precisely this situation that the Court addressed itself in *Chambers* when it stated:

> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably,

> only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater'. But which is the 'greater' and which is the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers* v. *Maroney,* supra, 399 U.S. at 51-52.

Clearly, these contentions are meritless.

The Constitution is a living instrument. In construing it for application to the ever-changing world in which we live, it is necessary that it be interpreted in a rational, commonsense manner, for it governs the lives of *all* our people. The respondent here has in reality, attempted to carve out an exception for "luggage" from the automobile exception and in so doing, has asked this Court to forge an interpretation of the Fourth Amendment which flies in the face of existing law, as well as common-sense and rational thought. Clearly, his contentions are meritless and must therefore be rejected.

CONCLUSION

For the foregoing reasons, the petitioner prays that relief be granted and the decision of the Arkansas Supreme Court be reversed.

Respectfully submitted,

STEVE CLARK
Attorney General

JOSEPH H. PURVIS
Deputy Attorney General
Justice Building
Little Rock, Arkansas 72201

and

JOHN WESLEY HALL, JR.
Deputy Prosecuting Attorney
304 Pulaski County Courthouse
P. O. Box 1979
Little Rock, Arkansas 72203
Attorneys for Petitioner